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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

HILL-BEHAN LUMBER COMPANY, a Corporation,
Petitioner,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

and

BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Missouri.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Hill-Behan Lumber Company, a Missouri corporation, respectfully petitions for a writ of certiorari to review a final decision of the Supreme Court of the State of Missouri rendered in the above-entitled cause on February 14, 1941, not yet officially reported, but appearing in 148 S. W. (2nd) 499. Motion for Rehearing and Motion to Transfer to Banc were denied on March 13, 1941 (R. 315). This decision affirmed a decree entered by the Circuit Court of St.

Louis County, Missouri, sustaining the motion for new trial of defendant, State Highway Commission of Missouri, after the plaintiff, Hill-Behan Lumber Company, had obtained a verdict for damages in the sum of $42,500.00 on account of damage to its property in St. Louis County, Missouri, occasioned by the construction of a viaduct to eliminate a grade crossing. The suit was originally filed in Cole County, Missouri (R. 1), the court designated by the Missouri Statutes (Sec. 8750, R. S. 1939) as the venue of all suits brought against the State Highway Commission, and was sent to St. Louis County upon motion by defendant for a change of venue (R. 2).

SUMMARY STATEMENT OF MATTER INVOLVED.

In 1916 (R. 22) the predecessor of petitioner, which was incorporated in 1923 (R. 40), acquired a lumberyard site located in the metropolitan area of the City of St. Louis, Missouri (R. 70, 71, 76), but about 1,500 feet west of the city limits (R. 77) at the junction of Page Boulevard,[1] a well traveled 100 foot wide thoroughfare, and the Wabash Railroad tracks (R. 71, 72, 74). About 1932, U. S. 40, the main cross-state highway between St. Louis and Kansas City, was rerouted along Page Boulevard, and in 1935, following appropriate legal provisions authorizing same (R. 286-291), the State Highway Commission of Missouri commenced the construction of a viaduct across the Wabash tracks (R. 75, 76), and thereafter completed the same (R. 32, 33).

Access to petitioner's property from said viaduct is by means of narrow ramps with sharp turns requiring back and forth maneuvering of the lengthy trucks used by the petitioner and by customers who call at petitioner's lumberyard with their own trucks (R. 32-36), 104). Also a serious traffic hazard was created (R. 104), causing a number

1 Gratuitously dedicated in 1870 as a public highway (R. 277-281).

of accidents to vehicles which had to break through two lanes of traffic to reach the ramps (R. 34-36, 186). For the above reasons the petitioner suffered serious damages to its property as a business location (R. 32, 75). Plaintiff's witnesses placed the damage to petitioner's property at $100,000.00 or more (R. 74, 87) and the jury returned a verdict of $42,500.00 (R. 13).

Article II, Sec. 21, of the Constitution of Missouri, provides:

> "**Private property for public use—compensation.**—That private property shall not be taken or **damaged** for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken." (Emphasis ours.)

The opinion of the Supreme Court of Missouri recognizes that line of cases in Missouri under which damages are allowed to abutting property owners in municipalities on account of change of grade, whether due to a viaduct or otherwise,[1] but holds that abutting property owners who are outside the boundaries of municipalities are not likewise entitled to damages,[2] but that any damages which they may suffer to their property must be considered "damnum absque injuria."[3] In attempting to justify this

1 148 S. W. (2d), l. c. 500.

2 148 S. W. (2d), l. c. 500-501.

3 148 S. W. (2d), l. c. 502.

discrimination between property owners on one side or the other of the city boundary, the opinion, following the case of *Zoll v. St. Louis County,* 343 Mo. 1031, 124 S. W. (2d) 1168, decided in December, 1938, after the viaduct here involved was constructed and the present suit was pending, asserts that a municipality, in changing the grade of a street, "is acting in a private and proprietary capacity and for its own private benefit."[4] It then points out that the State Highway Commission is acting in a public capacity.[5]

Before bringing the present suit, petitioner filed an injunction suit against the construction company which was constructing the viaduct, and against the members of the State Highway Commission. Said prior case on appeal to the Supreme Court of Missouri is reported as *Hill-Behan Lumber Co. v. Skrainka Construction Co. et al.,* 341 Mo. 156, 106 S. W. (2d) 483, in which the Supreme Court of Missouri denied the injunction, holding that petitioner had an adequate remedy at law for damages. The opinion in the present suit construes the opinion in the prior suit as not holding that the petitioner was entitled to recover damages on the theory that that question was not before the Court, but that the effect of the holding in the prior case was that if the petitioner was entitled to recover any damages it had an adequate remedy at law.[6] However, the opinion contains statements which seem to be contradictory to the above holding, as the opinion construes Sec. 8102, R. S. Mo. 1929 (Sec. 8750, R. S. Mo. 1939), which provides that the State Highway Commission "may sue and be sued" as meaning that there must be a specific statute authorizing the identical character of suit.[7] There is no other express authority for the State Highway Commission to be

4 148 S. W. (2d), l. c. 500-501.

5 148 S. W. (2d), l. c. 501-502.

6 148 S. W. (2d), l. c. 502.

7 148 S. W. (2d), l. c. 500.

sued than said section, and so, unless the Supreme Court of Missouri had in mind liability as distinguished from immunity from suit, the effect of the holding would be that no action of any sort can be filed against the State Highway Commission, although there are many cases, which are collected in the case of *Bush v. State Highway Commission of Missouri,* 329 Mo. 843, 46 S. W. (2nd) 854, recognizing that the State Highway Commission is generally subject to suit, but that it cannot be held liable in tort actions.

BASIS OF THE JURISDICTION OF THIS COURT.

Jurisdiction is claimed under Section 344, Title 28, U. S. C. A. In petitioner's first amended petition, the petition upon which the case was tried in the trial court, petitioner alleged that his private property had been taken and damaged for public use by the defendant; that defendant had failed and refused to pay just compensation, or any compensation therefor; that there was a violation of the aforesaid Section 21, Article II, of the Constitution of Missouri, and a violation of the Fourteenth Amendment of the Constitution of the United States providing that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation, and that no State shall deny to any person within its jurisdiction the equal protection of the laws (R. 9). The Missouri practice for appeal requires a statutory form of an affidavit for appeal (Sec. 1186, R. S. Mo. 1939). Petitioner's brief in the Supreme Court of Missouri, while not a part of this record, raised issues under the aforesaid Missouri constitutional provision and under the Fourteenth Amendment of the Constitution of the United States, both on the basis of due process of law and equal protection of the laws, as set forth in more detail in the Motion to Transfer

to transfer to Court en Banc, hereinafter mentioned (R. 304). After the opinion of the Supreme Court of Missouri was rendered, petitioner filed a Motion for Rehearing, raising both the due process and equal protection of the laws clauses of Section 1 of the Fourteenth Amendment, in connection with the suability of the State Highway Commission and the contention that an action to recover damages is not maintainable, and against the theory of immunity from suit of said Commission, as is more fully set forth in paragraphs 1, 4, 5 and 10 of said Motion for Rehearing (R. 301). Petitioner also filed a Motion to Transfer to Court en Banc, pointing out the federal constitutional questions under the due process and equal protection of the laws clauses of Section 1 of said Fourteenth Amendment raised in the brief, asserting that said federal questions were decided adversely to the petitioner in said opinion, and that said opinion was in conflict with prior holdings of the Court en banc, and denied equal protection of the laws, as more fully set forth in said motion (R. 304-306).

THE QUESTIONS PRESENTED.

(1) Does the opinion of the Supreme Court of Missouri deny equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States by discriminating between property holders in municipalities and property holders elsewhere in the State, arbitrarily granting damages to one class and denying damages to another class, where there is no reasonable basis for such discrimination?

(2) Should the opinion of the Supreme Court of Missouri, in view of its conflicting statements, be construed as granting immunity from suit to the State Highway Commission of Missouri, as distinguished from attempting to deny liability?

(3) If construed as granting immunity, does it violate the provision of the Fourteenth Amendment of the Constitution of the United States requiring that a State grant equal protection of the laws to its citizens?

(4) Does said opinion violate the due process clause of the Fourteenth Amendment?

REASONS WHY A WRIT OF CERTIORARI SHOULD ISSUE.

Many States have constitutional provisions which contain the words "or damaged," or their equivalent, thus extending the provisions of the Fifth and Fourteenth Amendments dealing with the taking of private property for public purposes. The decisions construing such constitutional provisions have permitted damages of the character in question.[1] The highway systems of the various States are a development of recent years and the building of viaducts to eliminate grade crossings has become an important feature of the development of traffic regulation. The large number of occasions where viaducts may cause serious damage to what is essentially city property, though beyond the borders of the city, render of national importance the question of whether a State can constitutionally discriminate between its citizens in permitting damages where grade crossings are within cities, but refusing damages when they are in a metropolitan area just outside the city border. The question is of great importance, not only to property owners in districts outside of city limits, but to the various State Highway Commissions, or similar bodies. The granting of the writ of certiorari and the decision of

1 *City of Chicago v. Taylor*, 125 U. S. 161, 31 L. Ed. 638; *Campbell v. Arkansas State Highway Commission*, 183 Ark. 780, 38 S. W. (2d) 753; *Perkerson v. State Highway Board*, 56 Ga. App. 316, 192 S. E. 475; *Pelt v. La. State Live Stock Sanitary Board*, 178 So. 644 (La. App.—not yet officially reported); *Kentucky State Park Commission v. Wilder*, 260 Ky. 190, 84 S. W. (2d) 38.

this Court on the subject would definitely settle the rights of thousands of property owners whose property may be thus damaged.

Petitioners further contend that the decision of the Supreme Court of Missouri is in conflict with at least the following decisions of this Court: *Liggett Co. v. Lee*, 288 U. S. 517, 77 L. Ed. 929, and *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578, showing when discrimination against localities does or does not deny equal protection and the principles to be applied; *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. Ed. 265, and *Cumberland Coal Company v. Board of Revision*, 284 U. S. 23, 76 L. Ed. 146, holding that arbitrary application of a law that is fair on its face, including such action by the State Supreme Court, denies equal protection of the laws; *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 83 L. Ed. 208, holding that where a State sees fit to grant a right which it is not required to grant, it cannot arbitrarily discriminate between citizens, and also permitting redress through a suit which would be considered as the equivalent of an improper action against the State where the Fourteenth Amendment is not involved, the latter proposition being also held by *Iowa-Des Moines National Bank v. Bennett*, supra; *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 55 L. Ed. 890, holding that an attempt to grant immunity from any relief from the action of a State corporation in damaging property would amount to a waiver of immunity against suit; *Prout v. Starr*, 188 U. S. 537, 47 L. Ed. 584, holding that enforcement of the Fourteenth Amendment is superior to State immunity from suit; *Reconstruction Finance Corporation v. J. G. Menihan Corporation*, 85 L. Ed., Adv. Op. 458, holding that the words "sue and be sued" waive immunity to suit.

PRAYER.

For the foregoing reasons, which are developed in further detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the Supreme Court of the State of Missouri commanding said Court to certify and send to this Court on a day to be determined, a full and complete transcript of the record of all of the proceedings of such Court had in this cause, to the end that this cause may be reviewed and determined by this Court; that the final order and decree of the Supreme Court of Missouri be reversed, and that the petitioner be granted such other and further relief as is proper.

HILL-BEHAN LUMBER COMPANY,
a corporation,
Petitioner,

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